# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

No. 451 112

BENJAMIN WEBER, JAMES ELLIS and SIMON BIRK,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

## PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals,
Eighth Circuit,

and

## SUPPORTING BRIEF.

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**To the United States Circuit Court of Appeals, Eighth Circuit.**

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Benjamin Weber, James Ellis and Simon Birk respectfully shows to this Honorable Court:

A.

### SUMMARY STATEMENT OF MATTER INVOLVED.

This is a proceeding under the National Labor Relations Act (commonly called the "Wagner Act") adopted July 5, 1935, Chapter 372, Section 16, 49 Stat. 457, 29 U. S. C. A., Sections 151 to 166, inclusive, against the Semi-Steel Casting Company charging said Company is engaging in certain unfair labor practices, in that said Company on

November 29, 1943, and at all times thereafter has refused to bargain collectively with the International Molders & Foundry Workers Union of North America, Local 59, A. F. L. (hereinafter called "the Union").

Pursuant to Notice of Hearing, Petitioners herein (Benjamin Weber et al.), in conformity with the Act prepared and filed their Motion to Intervene (Record 38), asserting, inter alia, that they were employees of the Company; opposed the union as their bargaining agent; that the Union did not win the election held on November 4, 1943; that as employees they were affected by any order requiring the Company to bargain with the Union; and that the actions of the National Labor Relations Board, as it affects these Petitioners, were without authority and violative of their constitutional guarantees under the Constitution of the United States, all as more fully set forth in their Answer to the Complaint (R. 40).

At the hearing, held May 1 and 2, 1944, these Petitioners duly moved the Trial Examiner to permit them to intervene and file their Answer in the proceeding, but on objection of counsel for the Board and on the ground "that the movants had no interest in the proceeding" the motion was denied (R. 68/9).

Thereafter, and on June 12, 1944, in due time, these Petitioners filed their exceptions (R. 53) to the ruling upon their Motion to Intervene and their Suggestions in Support. The Board, by its decision dated March 14, 1946, overruled the exceptions of these Petitioners and affirmed the Trial Examiner's ruling on the Motion to Intervene (R. 60/62). The Hon. Gerard D. Reilly filed his dissenting opinion expressing the view that the denial of the Motion to Intervene by the Trial Examiner on the ground these Petitioners "had no interest in the case constituted clear error" (R. 63/5).

Thereafter, and on April 13, 1946, in due time, these Petitioners filed their Petition for Review (R. 95/99) of the decision of the Board by the Eighth Circuit Court of Appeals. That Court affirmed the decision of the Board (Transcript 7) in an opinion filed March 13, 1947 (160 F. [2d] 388), which held that the dissenting employees, seeking intervention, were not necessary parties; and that the Board by its order requiring the Company to bargain with the Union did not thereby effectively exercise its power upon anyone but the Company. The effect of this holding was to find that the action of the Board and its examiner, in denying intervention to the complaining employees, was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and to find the dissenting employees were not directly affected by such a proceeding.

The petitioning employees at all times have denied the allegation of the Board that a majority of the employees had designated and selected the Union as their representative.

In reaching the conclusion that the Union is the duly elected bargaining representative, it was necessary for both the Board and the Circuit Court of Appeals to (1) estop the Company from asserting otherwise by reason of the terms of the Consent Election Agreement entered into by the Company, (2) deny the complaining employees, who would not be bound by the Election Agreement, the right to intervene, and (3) to then hold that in an election under the National Labor Relations Act the Union need only receive a majority of the valid (as determined by the Regional Director) votes cast, rather than a majority of the votes cast by qualified voters. In so holding, the Eighth Circuit ruled there was a question of Federal and not local law involved.

The basic question involved in the proceeding was whether the Union had ever been the duly elected bargaining agent, and on that determination depended the answer to the question whether the Company by its refusal to bargain was guilty of an unfair labor practice. The basic question, as stated, was properly in the case; see **Pittsburgh Plate Glass v. N. L. R. B., 313 U. S. 146, 85 L. Ed. 1251.** The decision of the Eighth Circuit Court rests upon estoppel, but it passes upon the basic question and in so doing announces what these Petitioners believe to be erroneous principles of law, in conflict with the decisions of the Supreme Court of the United States and with those of other Circuit Courts of Appeal.

At the time of the election held pursuant to the Consent Election Agreement it was agreed there were 129 employees qualified to vote. Of this number 119 employees who were qualified voters, presented themselves at the election and voted. Of these votes, cast by qualified voters, the representative of the Regional Director, on her own motion and without challenge, placed two of them in her purse without showing them to the other observers. One of those ballots had the voter's name written on the part thereof wherein the square "No" appears (R. 19). On the other, the voter had placed an "X" in both the "Yes" and "No" squares. Of the remaining votes, 59 were for the Union and 58 against. So, briefly stated, the 129 eligible employees expressed themselves as follows:

10—not voting
1—voting clearly "No", but signing his ballot
1—voting to express indifference to the outcome
58—voting against the union
59—voting for the union

129

And the basic question for determination was, as said in **N. L. R. B. v. Tower Co., 91 L. Ed. 245:** "whether a majority in fact voted **for** the Union." By that statement of the question, does the Supreme Court mean a majority of the employees in the unit, or a majority of the qualified employees **voting,** or does it mean a majority of the valid votes cast? If the latter, then by what rule of law shall the validity of a vote be determined? In passing upon these questions the Circuit Court of Appeals has enunciated rules and doctrines in violation of those set forth in **N. L. R. B. v. Tower Co., 91 L. Ed. 245, ...U. S....;** and is in conflict with the decision of the U. S. Circuit Court of Appeals for the Fourth Circuit in **N. L. R. B. v. Standard Lime, 149 F. (2d) 435, cert. denied 326 U. S. 723, 90 L. Ed. 429.**

And is it arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, for the Board and its agent to deny intervention to a group of dissenting employees when their application was orderly presented by counsel, there were no other applications to intervene, and the company was estopped to urge any defense to the basic question involved?

B.

## STATEMENT DISCLOSING BASIS OF JURISDICTION.

1. The original date of the Opinion entered in this case was March 13, 1947 (Transcript 7). On Motion to Enlarge Time within which to File Petition for Rehearing, the time therefor was extended by the Court to April 9, 1947 (Transcript 32). Petition for Rehearing was filed April 8, 1947 (Transcript 43), within the time provided for by the rules and orders of the United States Circuit Court of Appeals, and the Petition for Rehearing was denied April 21, 1947 (Transcript 45). Decree was entered April 26, 1947 (Transcript 17).

2. The jurisdiction of this Court is based upon Judicial Code, Section 240, as amended by the Act of February 13, 1925, 43 Stat. 938, U. S. C. A., Title 28, Section 347.

C.

## QUESTIONS PRESENTED.

1. Whether, in an unfair labor practice proceeding before the National Labor Relations Board, it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, to deny intervention to a group of dissenting employees whose application for intervention is orderly presented by counsel, there being no other persons or employees seeking intervention, and the employer is estopped by the provisions of a Consent Election Agreement to assert the Union was not the validly chosen bargaining representative.

2. Whether denial of intervention under the circumstances set forth in Question No. 1 above constitutes a denial of due process of law to the dissenting employees.

3. Whether, in determining if a bargaining representative has been chosen under the National Labor Relations Act, such representative must receive the votes of a majority of the employees in the unit, or of a majority of the qualified employees voting, or only a majority of the valid votes cast.

4. Whether the National Labor Relations Board is vested with discretion to determine its practice with respect to Question 3 above.

5. Whether, in determining the validity of a vote cast in a labor election under the National Labor Relations Act, the federal or local law shall apply.

6. Whether the order of the Board, affirmed by the Circuit Court of Appeals, requiring the Company to bargain

exclusively with the Union, violates and contravenes the Ninth Amendment to the Constitution of the United States of America, insofar as it affects the rights of Petitioners to bargain with the Company.

7. In the interest of brevity (Rule 38, para. 2; **Furness, Withy Co., Ltd., v. Lang-Tsze Insurance Assoc., Ltd., 242 U. S. 430**), Petitioners do not at this time set forth all of the questions which will be urged in the argument on the merits of this cause should the writ be granted, nor all of the contentions in support of such questions, but in order to comply with the rule of this Court requiring that all issues upon which decision is requested be presented in the petition for certiorari (**Gunning v. Cooley, 281 U. S. 90, 98**), Petitioners here refer to and incorporate into this petition all of the matters presented in their Petition to Review Order of the National Labor Relations Board relied upon on the appeal to the U. S. Circuit Court of Appeals for the Eighth Circuit (R. 95/101) with the same force and effect as if herein set out in full.

D.

## REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. Because the Opinion and Decree of the Circuit Court of Appeals for the Eighth Circuit in this case is in direct conflict with the decision of the Supreme Court of the United States in **N. L. R. B. v. Tower Co., ... U. S. ..., 91 L. Ed. 245.**

2. Because the United States Circuit Court of Appeals for the Eighth Circuit has decided important issues in the administration of the National Labor Relations Act which have not been but should be settled by this Court.

E.

Wherefore, it is respectfully submitted that the petition for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit herein applied for should be granted.

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Respondent.

## BRIEF IN SUPPORT.

I.

### THE OPINION OF THE COURT BELOW.

The intermediate report of the Trial Examiner was dated May 23, 1944 (R. 66). The Decision of the National Labor Relations Board was entered March 14, 1946, and appears on Record pages 56 to 65. The Opinion of the Eighth Circuit Court of Appeals (written by Riddick, J.) was filed March 13, 1947, and appears in Transcript pages 7 to 17. It is reported in 160 F. (2d) 388.

II.

### JURISDICTION.

The essential facts relative to the jurisdiction of this Court are fully stated in the accompanying petition for certiorari (supra, page 5) and in the interest of brevity are not repeated here.

III.

## STATEMENT OF THE CASE.

The essential facts of the case are stated in the accompanying petition for certiorari (supra, page 1) and in the interest of brevity are not repeated here. Any necessary elaboration of the facts on the points involved will be made in the course of the argument, which follows.

## IV.

## SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred in sustaining the denial of intervention and in not finding such denial to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

2. The denial of intervention under the circumstances here present was contrary to constitutional right, or in excess of statutory authority, or short of statutory right.

3. The enforcement of the order of the Board by the decree of the Circuit Court of Appeals is violative and constitutes an abridgment of the Ninth Amendment to the Constitution.

4. The denial of intervention to Petitioners has denied them the due process of law guaranteed by the Constitution.

5. The Circuit Court of Appeals erred in holding that a bargaining representative may be selected under the National Labor Relations Act by less than a majority of the employees in the unit.

6. The Circuit Court of Appeals erred in holding that a bargaining representative may be selected under the National Labor Relations Act by less than a majority of the voting employees.

7. The Circuit Court of Appeals erred in holding that a bargaining representative may be selected under the National Labor Relations Act upon receiving a majority of the votes cast and found to be valid by the Regional Director, even though it is not a majority of all votes cast.

8. The Circuit Court of Appeals erred in holding neither the Fleming vote nor the twice marked ballot need be counted.

9. The Circuit Court of Appeals erred in holding that the validity of a vote in an election under the National Labor Relations Act shall be determined by the rules of the Board.

10. The Circuit Court of Appeals erred in affirming the decision of the National Labor Relations Board.

## V.

## ARGUMENT.

### 1.

Although Section 10 of the National Labor Relations Act **[29 U. S. C. A., Sec. 160 (b)]** specifically provides that in the discretion of the Board or its agents any person, other than the person complained of, may be allowed to intervene in a hearing on a charge of an unfair labor practice, not a single case has come to the attention of these Petitioners in which dissenting employees have sought intervention and been granted their request. There seem to be no standards by which dissenting employees may gauge their request, except what seems to be an inflexible rule of the Board, sustained by several Circuit Courts of Appeal, that dissenting employees are not necessary parties and intervention will be denied. They, for whom the act is ostensibly written and who are bound against their wishes by its operation, are not to be heard in such a proceeding even though their application is orderly made, even though they are the only persons seeking intervention, and even though they are the only ones who can assert a defense to the charge. Truly they have become, by practice and despite the intent of Congress, "a forgotten interest."[1] It is respectfully submitted that such arbitrary action, and such an established practice, is the equivalent of a denial to them of a due process of law, as guaranteed them by the Constitution.[2] This Court should require the Board and the appellate courts to establish a standard more in keeping with legis-

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1 Dissenting opinion of Mr. Justice Jackson in N. L. R. B. v. Tower, 91 L. Ed., l. c. 251.

2 See 33 Am. Bar Assn. Journal 516, May 1947 (column 3)—from paper of John Dickinson entitled "Administrative Procedure Act: Scope and Grounds of Broadened Judicial Review."

lative intent and Constitutional guarantees. The Constitutional guarantees are familiar and have been in existence for more than 150 years. Congress has further expressed its legislative intent in this matter as recently as December 11, 1946 when the new Administrative Procedure Act **[5 U. S. C. A.—Pocket Sup.—Sec. 1009 (e)]** became effective. (This Act was not in effect at the time the instant case was briefed and argued in the court below.) Congress there authorized the courts to compel agency action unlawfully withheld where it is found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or contrary to Constitutional right, or in excess of statutory authority or short of statutory right.

The Board, and the Eighth Circuit Court of Appeals, have endeavored to justify denial of intervention in this case on the ground that the Petitioners had no interest in the case. Such a finding is contrary to fact and to the holdings of this Court. Actually, as pointed out in the Petition for Rehearing, when the Board and the Court rule the Union was validly designated the bargaining agent, the dissenting employees *instanter* lose their constitutionally retained rights to have a voice in deciding (1) their wages, (2) their hours of employment, (3) every other condition of their employment, and (4) how any grievance they may have may be settled. In addition to those lost rights, they may also lose, if the Company and the Union agree to it, their right to (5) stay out of the Union, (6) resign from the Union if they should join it, (7) refuse to pay Union dues, (8) get full pay without deduction of Union dues, (9) refuse to contribute to elect to public office candidates or political parties they oppose. About the only right left the dissenting employees is to "present a grievance" to their employer—and then they are not permitted to participate in its settlement.

The loss of these rights has been sustained on the ground that Congress, under the "Commerce Clause" in the Constitution, has authority to so legislate. But such construction runs afoul of the Ninth Amendment, which, by its terms, operates to prevent the Commerce Clause being so construed as to deny or disparage the certain rights, above enumerated, retained by the people, including the dissenting employees.

And for the Board to construe its discretion to deny intervention so that no dissenting employees are permitted to intervene in a case such as the one here certainly denies the dissenting employees (against whom the order of the Board designating the Union as bargaining agent effectively operates) that due process of law to which they are entitled.

2.

The National Labor Relations Act, Sec. 9, **29 U. S. C. A., Sec. 159 (a)**, provides that bargaining representatives shall be designated or selected "**by the majority of the employees** IN A UNIT." The Board has construed this to mean by a majority of the valid votes cast; some of the Circuit Courts of Appeal have sustained this ruling. This Court has never passed on the question,[3] but the clear language of the Act would require the bargaining representative to receive the votes of the "majority of the employees **in a unit.**" In the case here, only 59 votes were cast **for** the Union, and there were 129 employees in the unit involved. Congress, in the new labor bill, has made clear its intention that the bargaining representative should receive the votes of the majority of all the employees in the unit. Even Labor has admitted this was intended. Mr. Lee Pressman, General Counsel for the C. I. O., one of the two largest unions in this country, stated in an address he made be-

[3] N. L. R. B. v. Standard Lime, 149 F. (2d), l. c. 437.

fore the Forum on Labor Law at Omaha, Nebraska, on January 25, 1947 that "bona fide collective bargaining presumes that the union which is to be one of the contracting parties **must** be chosen by a majority of the employees **to be covered by the contract.**"[4] His language is clear. The intent of Congress, expressed in the new bill after the strained interpretation of the present Act by the Board, is equally clear. It is respectfully submitted this Court should pass upon and construe this important provision of the present Act.

3.

If the Act is construed so that a bargaining representative need not receive the votes of "a majority of the employees" **in the unit,** then it is submitted the representative must receive a majority of all votes cast by qualified voters. In the case here 119 qualified employees voted—they were voting employees. This Court, in **N. L. R. B. v. Tower,** ... **U. S.** ..., **91 L. Ed. 245,** stated that there was an unfair labor practice **only** if the union was chosen by a **majority of the voting employees.** In the case here there were 119 voting employees, of which only 59 voted **for** the Union. It was unimportant how the other qualified voters cast their ballots: whether they voted against the Union, or voted for some other union, or for an individual, or voted to express an indifference to result, or wasted their ballot. The test under the **Tower** case would be, did a majority of the voting employees vote **for** the union? On this important point this Court has not clearly declared the law. These Petitioners interpret the Tower case to mean what they argue herein. If it does, then the Eighth Circuit has clearly misapplied the law. If not, then this Court should make the point clear.

4 12 Mo. Law Review, l. c. 10.

4.

It is seldom that an election would be decided by one vote, but that has happened here. It nearly happened in the **Tower** case. It will probably happen again. For that reason it is important that standards be announced by which a doubtful ballot shall be judged. In the case here, even if the Board is correct on all else, there would still be no bargaining representative chosen if either the Fleming vote (R. 19) or the vote shown at Record page 21 should have been counted. Votes for "neither" were counted to secure a total in **N. L. R. B. v. Standard Lime, 149 F. (2d), l. c. 439.** The ballot (R. 21) marked "Yes" and "No" is certainly a vote for neither the union nor the company. The Fleming ballot is reproduced in the Record at page 19. The Board has not counted the vote, and as authority therefor cites its own decisions in **Matter of Burlington Mills, 56 N. L. R. B. 365, 368** and **A. J. Tower, 60 N. L. R. B. 1414.** Those decisions make it clear the Board believes such matters are determined by its own rulings. The Eighth Circuit Court of Appeals seems to agree with this. These cases, however, dealt with a post-election challenge to the eligibility of a voter, whereas the point here is as to the validity of a vote cast by an admittedly eligible voter. Under the rule in Missouri, where the election was held, Fleming's vote was undoubtedly valid. The Board's Decision admits this is possibly so (R. 58-59). Should the rule of local law determine such questions? Several courts have held that the Act affects the substantive law of the states. The **Tower** case states the Board must give effect to the principle of majority rule " 'sanctioned by our governmental practices, by business procedure and by the whole philosophy of democratic institutions.' " The voter in Missouri is presumably familiar with the voting rules in his home state, and those rules govern both in his

election of state and federal officers. If Congress should submit an amendment to the Constitution and provide for the organization of conventions in the various states, the state's election laws would determine the validity of votes cast for members of that convention. The rule of reason would call for the testing of a ballot in a labor election by the law of the forum. Certiorari should be granted to put at rest this important question in the administration of the Act.

5.

It is respectfully urged certiorari should issue so that these important questions in the administration of the Act may be determined, and the constitutionality of the Board's orders ascertained.

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